

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

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FILE: B-210654**DATE:** December 23, 1983**MATTER OF:** Coast Janitorial Service, Inc.**DIGEST:**

1. Solicitation for custodial services was properly canceled where a provision of the Joint Continuing Resolution of December 21, 1982 prohibited the General Services Administration (GSA) from contracting out for the services contemplated by a portion of the solicitation and the term of the existing contract for the remainder of the work encompassed 6 months of the performance period covered by the solicitation.
2. A protester is not entitled to bid preparation costs where agency makes a reasonable determination to cancel a solicitation after bid opening, even if part of the information forming the basis of the decision to cancel was available to the contracting officer prior to bid opening, where there is no indication that agency acted in bad faith.

Coast Janitorial Service, Inc. protests the cancellation of invitation for bids (IFB) No. GS-07B-21185/7S issued by Region 7 of the General Services Administration (GSA). Coast contends that there was no rational basis for the cancellation. It requests that we award it bid preparation costs and "costs incurred subsequent to the schedule preparation." We deny the protest and the claim.

The solicitation was issued on June 7, 1982, and sought bids on a 1-year contract for the period of September 1, 1982 through August 31, 1983, with 2 option years, to provide custodial services in four Federal buildings in Houston, Texas. The solicitation directed bidders to submit bids on Phase I (for services that were

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currently being performed by an incumbent contractor) and Phase II (for services currently being performed by GSA employees).¹ Award was to be based on the total price for the base and option years. The solicitation also noted that bids on Phase II were being solicited as part of an Office of Management and Budget Circular A-76 (A-76) cost comparison.

Meanwhile, since the then current contract for the custodial services was about to expire, GSA on June 17 exercised the option in the incumbent's contract extending that firm's period of performance through June 30, 1983. These were the services encompassed by Phase I of the solicitation. After several amendments to the solicitation, bid opening was scheduled for September 7 and the performance period changed to January 1 through December 31, 1983.

At the September 7 bid opening, Coast was the apparent low responsive bidder. GSA found Coast to be nonresponsible because of inadequate finances and referred this matter to the Small Business Administration (SBA) for consideration under its Certificate of Competency (COC) procedure. On November 2, 1982, SBA issued a COC to Coast. Thereafter, the contracting officer was informed by GSA Headquarters that Congress had passed the Joint Continuing Resolution of December 21, 1982, Pub L. No. 97-377, 96 Stat. 1830, 1913, which prohibited GSA from obligating funds for contracting out for janitorial services that were being performed by GSA employees prior to the date of the enactment of the Joint Resolution. The contracting officer believed that this law required the procurement to be discontinued and on January 12, 1983, she canceled the solicitation.

¹Phase I covered services in four buildings while Phase II only covered services for a portion of one of the buildings.

Coast contends that the cancellation was improper because it was not based on one of the justifications for cancellation enumerated in Federal Procurement Regulations (FPR) § 1-2.404-1. Coast also argues that the Joint Resolution should not be applicable to this procurement because its bid price was less than the price paid to the incumbent, and less than the cost to the government to do the work itself.

Cancellation of a solicitation after bid opening and the exposure of bids is not permitted unless a cogent and compelling reason for cancellation exists. The determination as to whether such a reason exists is, however, an administrative one to which we will not object unless the protester can demonstrate that the decision was arbitrary, capricious, or not supported by substantial evidence. McGregor Printing Corporation, B-207084; B-207377, September 20, 1982, 82-2 CPD 240.

We agree with GSA that it was prohibited by the Joint Resolution from contracting out for the janitorial services encompassed under Phase II of the bid schedule. See Consolidated Maintenance Company, B-209766, March 7, 1983, 83-1 CPD 225. The fact that the protester's bid was less than the cost to the government of performing this work in-house does not alter the fact that the Joint Resolution prohibits the agency from contracting for these services.

Further, Coast's contention that the cancellation was improper because it was not based on one of the justifications for cancellation enumerated in FPR § 1-2.404-1(b) is without merit. That regulation requires a compelling reason for cancellation and a determination by the contracting officer that cancellation is in the best interest of the government. The enumerated reasons are merely examples of circumstances justifying cancellation and are not intended to exclude other instances where the contracting officer using his broad discretion reasonably determines that cancellation of all or a portion of a solicitation is in the best interest of the government. See, e.g., McCain Trail Construction Co., B-196856, July 8, 1980, 80-2 CPD 16 (compelling reason to cancel solicitation existed where contracting agency determined that adequate funds were not available for contract obligation).

Thus, GSA clearly had a proper basis for canceling the Phase II portion of the solicitation. The protester, however, challenges GSA's decision to cancel the entire solicitation. GSA states that it did so because (1) it never intended to award only Phase I, (2) the solicitation did not permit award of only Phase I, and (3) the work covered by Phase I was at the time of the cancellation being performed by the incumbent contractor under the option exercised earlier. GSA explains that the contracting officer exercised that option in good faith because the services were needed during the solicitation period. It appears that GSA recognized that there would be an overlap in the performance periods included in the solicitation (January 1 -December 3, 1983) and in the incumbent's extended contract (June 1982-June 1983). It apparently contemplated ultimately terminating the incumbent's contract for the convenience of the government so that it could have a single contractor for Phase I and Phase II; however, after learning that the Joint Resolution would prohibit it from awarding Phase II, GSA explains that it did not feel that termination for convenience would be appropriate in light of Torncello v. United States, 681 F.2d 756 (Ct. Cl. 1982) (which severely restricted a contracting agency's right to use the termination for convenience clause in order to obtain the subject matter of the contract from another firm at a lower price), since the termination here would be based solely on the fact that GSA received a lower bid price under the solicitation for Phase I than it was currently being charged by the incumbent.

It is not clear why GSA believes the solicitation did not permit a separate award of the Phase I requirement. The solicitation provided at section B that "Phase II is subject to OMB A-76, is subject to review by the government, and at the government's option, may not be awarded, or if awarded, may be awarded at a later date." Thus, the inability of GSA to award the Phase II requirement did not alone provide a basis for the cancellation of the entire solicitation. However, in light of the Torncello case and GSA's resulting concern over the propriety of a termination under the circumstances here, we do not think the agency acted arbitrarily in deciding not to terminate the existing contract but instead cancel the solicitation.

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Finally, we have no basis upon which to award Coast its bid preparation costs as it requests. A prerequisite to entitlement to such costs as a result of cancellation of a solicitation is a showing that the government acted arbitrarily or capriciously or in bad faith with respect to a claimants bid or proposal. Heyer Products Co. v. United States, 140 F. Supp. 409 (Ct. Cl. 1956); Chrysler Corporation, B-206943, September 24, 1982, 82-2 CPD 271. Here, we have found that the agency had a reasonable basis for its decision to cancel. Moreover, while this decision may have been based in part on information available prior to the bid opening date, there is no allegation that the bids were solicited or opened in bad faith.

The protest and claim are denied.

for *Harry D. Jan Cline*
Comptroller General
of the United States